



# Product Liability

Here's the low-down on where your tool-set warning labels come from, and why they and other precautions are smart ideas for manufacturers in today's litigious climate.

By George N. Saliba, Managing Editor

**A**mericans may bemoan the trend toward overseas manufacturing, yet what often remains unmentioned is that legions of companies continue to make products in the United States. Moreover, while New Jersey has indeed witnessed a manufacturing decline, it remains part of the scenario: the Garden State is a global powerhouse for pharmaceutical and medical device firms, a node for behemoths like Honeywell and Ricoh, and home to myriad other firms that generate a wide range of products. These companies overwhelmingly strive to create reliable and safe items that promote loyal customer bases and strengthen their reputations. Nonetheless, the firms must contend with product liability, as state and federal laws attempt to strike a balance between

fostering design innovation and protecting consumers. In this vein, *New Jersey Business* magazine examines the realm of product liability law, from its more basic elements to recent legal trends.

### Types of Liability

In broad strokes, product liability may stem from product design defects, manufacturing defects, or a “failure to warn” users about potential hazards associated with products.

First, when a company conceives an idea for a product, attorneys say the potential uses of the product (including improper ones) must be analyzed. In what ways could the design be harmful? Is there a better design that might mitigate risks?

Second, during the manufacturing of the product, quality controls must ensure that a product is, say, created at the right temperature, or that steel and plastic are handled appropriately. If a company outsources manufacturing, it must oversee such work closely. Joseph E. Hopkins, a partner at the law firm of Patton Boggs LLP (offices in Newark and in eight other domestic and international locales), explains, “When it comes to product liability, it doesn’t cut it to say, ‘Well, it is not my job – it is the other guy’s job under our contract.’” In sum, there should be no manufacturing defects that could act as liabilities.

Once a company has a product that has been appropriately designed and manufactured, Hopkins says, “You have to think carefully: ‘Well, I may not have been able to design-out every risk. So, what warnings or instructions do I need to put on the product that are reasonable?’”

“You don’t have to warn of everything that could ever happen or you’d have a 1,500-page brochure for every



**Joseph E. Hopkins**, of Patton Boggs LLP, notes that a manufacturer’s failure to include warnings could expose it to liability.

can of dog food or hammer in Sears. But, you’ve got to [provide warnings] that might be the most obvious or reasonable risks so that somebody, later on, won’t say, ‘Well, you knew there was that danger – it was not bizarre or unheard of that it would come to pass. You should have had a warning on that.’ Failure to [include the appropriate warnings] could expose you to liability.”

Hopkins says a company must be mindful of its consumers and perhaps issue different warnings for items sold in bulk to other compa-



**Kim M. Catullo**, of Gibbons P.C., speaks with her clients about the things they might have done to avoid litigation.

nies, compared to products that, say, 15-year-old hobbyists might use.

Kim M. Catullo, who practices in both New York and New Jersey, is chair of the products liability department and the co-administrative director in charge of Gibbons P.C.’s New York office. She is also a member of the law firm’s executive committee (Gibbons has offices in Newark, Trenton, Manhattan, Philadelphia and Wilmington, Delaware). She adds that whether companies are selling pharmaceutical products or even children’s toys, they must ensure they have done everything possible from a regulatory standpoint. Moreover, while much of what is printed in instructions and warnings is a result of regulatory processes, having an attorney assist with those areas can be beneficial. Most large companies have in-house experts or consultants they work with on a regular basis, but mid-size companies and start-ups need to be particularly cognizant and consult attorneys early in the process.

Catullo says, “From my standpoint, after every case I have, I talk to my client about the things they can do to improve and what they could have done to avoid having gotten themselves into the [legal] situation. Most of the time, it is certainly not for having done something wrong. It’s just for not having necessarily thought something through entirely. I mean it could be having one word or another word [in instructions or warnings]. Having the right word could help you avoid litigation in which you have to prove that you did nothing wrong.”

### Post-Sale Duties

Kevin R. Gardner, a partner with Connell Foley LLP (the law firm with offices in Roseland, Jersey City, Manhattan and Philadelphia), notes

that companies also have post-sale obligations: once the product is on the market, a company can often mitigate its exposure to lawsuits, especially in the context of product recalls. He says a company should actively monitor all sources of information regarding how the product is performing and solicit feedback from distributors and consumers. What is wrong with a particular product that is being returned? To the extent there are complaints or claims regarding a product's poor performance, or there are customers being injured, these issues should be quickly and thoroughly evaluated to determine if there is a true problem that must be addressed on an expedited basis.

Gardner says, "Manufacturers tend to get into trouble when there are [product] problems that develop and they begin to percolate and the companies don't react as quickly as they should to try to address them. And it may well be that there are things that can be done, short of a recall, [such as] advisories that can be issued."

He says companies should look for patterns and trends. For instance, if there are very similar complaints, then there may be more cause for concern. With modern technology, companies in many cases may track a product after it leaves their plants, to determine the end-users. It is then easier to contact users with necessary warnings or recalls.

Beth S. Rose is a partner, the chair of the product liability practice group and a co-chair of the litigation practice group at Sills Cummis & Gross P.C. (offices in Newark, Princeton and Manhattan). She says that if companies learn about misuse of their products, she would advise them to consult with counsel regarding how to respond.



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Speaking about a YouTube Internet video, she says, “There was one instance where people had rigged-up chainsaws to race them, almost like a drag car race. Of course, the manufacturer (not a Sills Cummis client) never intended that this chainsaw would be used to entertain people. The manufacturer, I believe, found out about it and sent out a letter. I am sure they consulted with counsel about what to do, but in my mind, that is not a reasonably foreseeable misuse. Who would ever think that someone would take a chainsaw and rig it up that way?”



**Kevin R. Gardner** of Connell Foley LLP says companies should address problems with their products quickly and thoroughly.

the Food and Drug Administration (FDA) that require them to do certain things – and they do so successfully – federal law absorbs claims that might be brought in state court under various state laws throughout the country.

Gibbons’ Catullo says, “From the perspective of the companies, their view is that they have [complied with federal law], invested quite a bit of time and money in the process and have received the FDA approval - so they should be afforded this defense. On the other side of it – and I am not going to speak for the plaintiffs’ part – but I can tell you that they think no one should be provided a preemption defense.”

**Trends**

Amid a vortex of complexity, the issue of federal preemption defense

for companies has been under scrutiny. Essentially, preemption defense means that if companies are presented with federal laws from

Attorneys generally agree that a



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period of uncertainly exists now, in which people are examining what the U.S. Congress might do regarding preemption defense. Obviously, this makes it difficult for manufacturers to comprehensively plan for the future.

**Climate**

Patton Boggs' Hopkins says, "I think there is still an environment in our country and in our state that is conducive to innovation and entrepreneurial spirit. It is not dead – at least not yet. There is always a balance. At some point, deep in the past, people would make products any way they wanted to, sell them, and [it was]: 'Good luck. Let the consumer beware.' The other end of the pendulum could be such restriction that everything has to be encased in rubber and you walk around the world in a little plastic bubble so that you don't have any risk at all. Well, neither of those pendulum swings is a desirable place to be, obviously. I think that the courts and the legislature are always trying to find that balance."

Widely reported economic conditions and tight credit markets make it difficult to bring products to market, but, again, so do concerns about product liability. None of those concerns has to do with entrepreneurial spirit, which is focused on: What do people need? What is a product of value that can be brought to market? How does one market and sell the product?

On that point, Hopkins adds, "That's the guts of the driving force behind the entrepreneurial spirit and being able to sell your products. That's where companies need to focus. You can't ignore the rest of the stuff, but it is a drag. It is a necessary drag on the forward progress of getting products sold." **NJB**



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